

DEPARTMENT OF STATE REVENUE

**LETTER OF FINDINGS NUMBER: 96-0657 RO
RESPONSIBLE OFFICER LIABILITY
WITHHOLDING & SALES/USE TAX
FOR TAX PERIOD: 01/31/94 THROUGH 01/31/96**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Withholding and Sales/Use Taxes – Responsible Officer Liability

Authority: IC 6-2.5-9-3; IC 6-3-4-8; Dept. of Revenue v. Safayan, 654 N.E.2d 270 (Ind. 1995)

Taxpayer protests the imposition of responsible officer liability for withholding and sales/use taxes not paid to the Department.

STATEMENT OF FACTS

Taxpayer is an artist. A corporation was formed to handle the production, sales and distribution of the works produced by the taxpayer. The corporation was a family business. K, taxpayer's daughter, A, taxpayer's son, and taxpayer were all named officers of the corporation. The corporation failed to remit varied withholding and sales/use taxes during the tax periods 01/31/94 through 01/31/96. The Department assessed liability against the taxpayer as a responsible officer. Taxpayer protested the assessments. Additional relevant facts will be provided below, as necessary.

I. Withholding and Sales/Use Taxes – Responsible Officer Liability

Indiana Code section 6-3-4-8 states in part:

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(a) Except as provided in subsection (d), every employer making payments of wages subject to tax under IC 6-3, regardless of the place where such payment is made, who is required under the provisions of the Internal Revenue Code to withhold, collect, and pay over income tax on wages paid by such employer to such employee, shall, at the time of payment of such wages, deduct and retain therefrom the amount prescribed in withholding instructions issued by the department... Such employer making payments of any wages:

(1) shall be liable to the state of Indiana for the payment of the tax required to be deducted and withheld under this section and shall not be liable to any individual for the amount deducted from his wages and paid over in compliance or intended compliance with this section; and

(2) shall make return of and payment to the department monthly of the amount of tax which under IC 6-3 and IC 6-3.5 he is required to withhold...

(g) ... In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest.

Indiana Code section 6-2.5-9-3 states,

An individual who:

(1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and

(2) has a duty to remit state gross retail or use taxes (as described in IC 6-2.5-3-2) to the department; holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state. If the individual knowingly fails to collect or remit those taxes to the state, he commits a Class D felony.

In Dept. of Revenue v. Safayan, 654 N.E.2d 270 (Ind. 1995), the Indiana Supreme Court addressed the method of determining who has the authority, and therefore the duty, to remit taxes owed by a corporation.

The court laid out three factors relevant to determining authority. First, the person's position within the corporation must be considered. Second, the authority granted to the person via the articles of incorporation is established. Finally, it must be determined whether the person actually exercised control over corporate financial matters, or not. Safayan at 273.

Taxpayer contends she is not a responsible officer and does not satisfy the factors as presented in Safayan.

Taxpayer argues her title was a nominal title and gave her no authority. Taxpayer states, at no time, did she exercise any control over the financial matters of the corporation. Taxpayer argues she had no experience in operating a business and focused on creating the artwork, not on the day-to-day matters of the corporation. Taxpayer states she lived in Illinois while the business was located in and operated from

Indiana.

Taxpayer argues her daughter, K, initially handled all day-to-day operations and hired an outside
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payroll accounting service to assist her. On or about March 1994, K hired a certified public accountant, Mr. H, to handle the payroll functions. On April 24, 1995, Mr. H was named as the Chief Executive Officer of the company and given authority for “all financial and marketing decisions” as well as other duties.

Taxpayer has provided the Department with an agreement signed and dated by both taxpayer and Mr. H which names Mr. H as CEO. Taxpayer has also provided the Department with an affidavit from K supporting the taxpayer’s contentions. K’s affidavit confirms the roles played by both her and taxpayer.

K admits her authority to handle all day-to-day operations and financial decisions until Mr. H was appointed as CEO.

The Department finds the taxpayer is not a responsible officer for the assessment period. Taxpayer has proven she was not in a position of authority and did not exercise any control over the financial and tax decisions of the company.

FINDING

Taxpayer’s protest is sustained.

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